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Nos. 567, 664, 665, 666, 667, 668, 669.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

WILLIAM H. ELLIS, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

EASTERN DREDGING COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

BAY STATE DREDGING COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Ellis *v.* The United States, No. 567.

October 13, 1905, Ellis entered into a contract with the United States which provided that he should "provide, furnish, and deliver, at his own risk and expense, at the United States Navy-Yard,

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Boston, Mass., all the necessary materials, labor, tools, and appliances for the construction of a pile and timber pier, to be known as Pier No. 2, at said navy-yard," according to plans and specifications made a part of the contract, for a certain sum named. (Record, 5.) He was to commence work immediately after the execution of the contract and to complete the pier within six months (Record, 5), but for unavoidable delays—which were defined to be those caused by acts of the United States or such as result from causes which reasonably may be presumed to be beyond the control of the contractor, as acts of Providence, unusual storms, fires (not the result of negligence), fortuitous events, etc.—extensions of time might be made. (Record, 6.) Work was duly begun, but the pier was not completed until the week ending October 13, 1906. (Record, 7.) An extension of time was requested (Record, 14), but whether it was granted or not does not appear.

At the Boston Navy-Yard there are two dry docks—dry dock No. 1, to which this pier was attached, and another which was finished in 1905. (Record, 7.) Dock No. 1 was completed in 1835; has been in use ever since, and until 1903, when pier No. 1 was completed, had no approaches. (Record, 7.) Pier No. 2 constitutes a second approach to it. Dry docks are sometimes built, as was this one, without approaches, sometimes with one and sometimes with two. (Record, 8.) These piers or wharves or approaches constitute exten-

sions of the sides of the dock running out 150, 200 or more feet; and they serve a double purpose: They afford additional wharfage facilities in the Yard for furnishing ships with supplies and they make the docking of the ships easier, more economical of time and money, and safer. (Record, 8, 9.) When a dock has one or more of these approaches a ship is docked as follows: Awaiting proper tidal conditions, it is moored alongside the pier or wharf and great ropes are attached to its sides, which are passed around belaying pins on the piers; at the favorable moment the caisson of the dock is removed, the dock is flooded, men pull on the ropes, and the vessel moves steadily and evenly into the dock. (Record, 8, 10.)

In September, 1906, Ellis was indicted in four counts for violations of the act of August 1, 1892, chapter 352 (27 Stat., 340), commonly known as the eight-hour law. The first count charged, in substance, that Ellis was a contractor on a public work of the United States, namely, the construction of said pier, on June 13, 1906; that it was his duty to employ laborers and mechanics upon it; and that as a contractor he intentionally required and permitted, upon said day, a certain mechanic in his employ upon said work to labor more than eight hours, there being no extraordinary emergency. (Record, 2.) The second count was like the first except that a different mechanic was named. (Record, 3.) After plea of not guilty a verdict of guilty was returned upon the first two

counts, the third and fourth having been nol prossed with the defendant's consent. (Record, 4.) He was sentenced to pay fines of $250 on each count (Record, 25, 26), and thereafter this writ of error was allowed. (Record, 31.)

The defendant admitted most of the essential averments of the indictment and mainly sought to show that the overtime employment of these mechanics was excused by the presence of an extraordinary emergency upon the following evidence: 1. The Boston Navy-Yard and the one at Portsmouth, N. H., the former preferably, are the places where injured war vessels of the United States composing the North Atlantic Squadron would be brought for repairs. (Record, 11.) The construction of the pier makes the docking of vessels for repairs safer. (Record, 9.) Since 1836 ships have been safely docked without any approaches to this dock (Record, 12, 7); and about fifty were safely docked while there was but one approach. (Record, 8, 7.) There is no evidence of an injury to a vessel at this dock. The construction of this dock was not essential or necessary to the safety of the vessels; it was desirable merely. (Record, 11.) It would not make safer human life or limb. (Record, 11.) 2. The contract called for 311 long-leaf pine piles, and 17 more were found to be requisite (Record, 13), and 366 white-oak piles. (Record, 7.) The former kind could not be obtained from large dealers (Record, 13), and permission was given to substi-

tute short-leaf. (Record, 14.) No attempt was made to get the long-leaf variety from small dealers. (Record, 16.) There was great difficulty in getting the white-oak piles, as the contract required those of "freak" dimensions. (Record, 14, 16.) The defendant submitted his bid after conference with a civil engineer and contractor of great experience (Record, 13, 14), both of whom understood the number, dimensions, and quality of the piles to be provided, had bought piles before, and acknowledged that it was a part of their business to be familiar with the pile market. (Record, 15.) They realized that there was a chance that they might not get what they wanted promptly. (Record, 15, 16.)

The only substantial error alleged, beyond the failure to charge that the facts showed an extraordinary emergency, is that the eight-hour law is unconstitutional. (Record, 17, 26.) A number of other errors are assigned, but they are of such a character that it is probable that they will not be pressed.

Eastern Dredging Co. *v.* The United States, Nos. 664, 665, 666.

Bay State Dredging Co. *v.* The United States, Nos. 667, 668, 669.

These cases were six informations, filed at the December term, 1906, charging in appropriate terms violations of the act of August 1, 1892, chapter 352 (27 Stat., 340), commonly known as the eight-hour law. In Nos. 664, 665, and 666 it

was alleged, in substance, that the Eastern Dredging Company was a corporation, duly organized and having a usual place of business at Boston, Mass., on November 26, 1906; that it was a contractor whose duty it was to employ laborers and mechanics on one of the public works of the United States, namely, dredging a portion of the 35-foot channel of Boston Harbor known as section 4 of division 4, and that as a contractor it intentionally required and permitted the laborers and mechanics named to work for more than eight hours on said day, there being no extraordinary emergency. (Record, 664, 2, 3; 665, 2, 3; 666, 2, 3, 4.) The same allegations were made as to the Bay State Dredging Company, except that the violations are charged upon November 30, 1906, and the alleged public work was the dredging of Chelsea Creek in Boston Harbor. (Record, 667, 2, 3; 668, 2, 3; 669, 2, 3.) To each information motions to quash were filed and overruled, and, after pleas of not guilty, verdicts of guilty were returned upon all counts except the third count in No. 668, which was nol prossed with the consent of the defendant. (Record, 664, 5; 665, 5; 666, 5, 6; 667, 5; 668, 5; 669, 5.) Upon each information fines of $50 were imposed and thereafter these writs of error were allowed. (Record, 664, 33; 665, 12, 13; 666, 15; 667, 47; 668, 7; 669, 7.)

The assignments of error make these principal points: (1) The eight-hour law is unconstitutional; (2) the work upon which the defendants

were engaged was not "public works of the United States;" (3) the employees named were not laborers or mechanics; (4) there was an extraordinary emergency. Other errors are assigned, but it is not necessary to refer particularly to them here.

No. 664 alleged that deck hands and a crane tender's helper were laborers; No. 665, that the dredge captain, cranesman, or crane tender, as he is also called, and the fireman on the dredge were laborers; No. 666, that the master, mate, and fireman of the tug, and the scowman of the scow, were laborers, and that the engineer of the tug was a mechanic. Nos. 667, 668, and 669 make the same allegations, and, in addition, charge that the engineer and firemen of the dredge are mechanics.

Before stating the material facts bearing upon the question as to which of these employees, if any, are laborers or mechanics, descriptions of the dredge, scow, and tug, and of a dredging operation, will be given.

DESCRIPTION OF DREDGE, SCOW, AND TUG.

The dredge's hull is rectangular in shape, flat-bottomed and square-sided, built with unusual strength to stand the extreme strain to which it must be put. It is afloat while working and is held in place by four piles called "spuds," one at each of its four corners. Its forward part is occupied by the engines, with necessary boilers, that operate the scoop or dredging bucket, control the spuds, and furnish all necessary power. The hull supports an A frame, pivoted near the center and extending

over the bow of the hull. In the bow there is an arm projecting upward and outward, known as a "boom," its bottom end being pivoted to a turntable set in the forward end of the dredge connected with the engine, so that a lateral and, by chains passed over the A frame, an up-and-down movement may be given to the boom. At the end of this boom, by devices not necessary to be described, is fixed the bucket, swung on a pivot so that it may move up and down and forward and back. All the movements of the bucket are governed and controlled by machinery operated by levers, which movements are determined by the dredge captain, with a single exception: The movement of the bucket up and down the boom is determined by the cranesman. The bottom of the bucket is hinged and is known as the "door." It has a catch attached to a rope operated by the cranesman, who pulls the rope to open the door. A dredge can move itself for short distances slowly by putting its bucket down in the mud ahead and then pulling it up by means of chains attached to the bucket. Except for locomotion in this method the dredge must be towed from place to place and from port to port. (Record, 667, 21, 22; 664, 15.)

The scows are square-sided, oblong in shape, containing compartments known as "pockets," adapted to receive the dredged material, with bottoms which open to dump it. They are flat-bottomed and have no keel, flashboards, rudder, or steering apparatus of any kind. (Record, 667, 20.)

The tugs are the familiar towboats operated by steam.

DREDGING OPERATION.

In the ordinary performance of dredging contracts—and these contracts were performed in the ordinary manner—the company's fleet, consisting of the dredge, scows, and towboats or tugboats, is towed by the latter from port to port outside the headlands, having on board its crew. (Record, 664, 15.) When the location of the work is reached, the engine which moves the crane or boom is started, the spuds are let down, the crane and its bucket, which is the implement which scoops the mud and other material from the bottom, goes down and comes up full; the cranesman or cranes tender and his helper guide the bucket over one of the attendant scows and by means of a line empty it. (Record, 665, 6.) The bucket is lifted up and down by machinery connected with the main engine, all worked by steam. The machinery which operates the bucket has levers which make the bucket go up and down and swing over the scows. The dredge captain handles these levers and works them with his hands (Record, 665, 6); there is an engineer who tends the main engine, having under him an assistant, known as an oiler, who spells him as occasion may require, and one or more firemen (Record, 664, 10); upon the dredge there are several deck hands who wind up the scows, tend the lines, make the scows fast and cast

them off, who work with their hands entirely, and do anything which the dredge captain orders (Record, 664, 9); upon the scow is an employee known as a scowman, who shovels the mud off the sides of the scow while it is alongside the dredge and keeps it clean (Record, 666, 8); when a scow is full one of the tugboats takes it in tow so as to reach the dumping ground at low water, and the scowman assists in the towing; when the dumping ground is reached the several pockets of the scow are opened by the scowman and he sees that the material, which often sticks in the pockets, is dumped (Record, 666, 8); the crew of the tugboats consists of a captain, a mate, an engineer, and fireman; and besides towing the scows to the dumping ground, the tugs shift the position of the scows about the dredge, and bring from the shore supplies for the dredge; they are required to be in readiness at all times for services that may be required. At the completion of the day's work, which is generally planned to last eleven or twelve hours, it is the duty of the crew of the dredge and of the scowman to clean up and make all snug for the night, and to set the lights on the dredge and on the scow required by law. The watchman of the dredge has charge during the night of any scows that may be moored near by. (Record, 664, 11.)

It appears that the crew of the dredge are paid by the month and are fed and provided with rooms on the dredge. (Record, 667, 18; 664, 13.) Sometimes one or more of the scows is provided with

rooms, and when this is the case the scowmen live on board and cook their own meals; otherwise they live on board the dredge and are fed there and are paid by the month. The dredge captain has general charge over the dredging operation and directs the movements of the scows and the tugs, except that the master of the tug may refuse to tow a scow to the dumping ground if he considers the weather conditions to be unfavorable. (Record, 667, 11; 664, 11.) As stated above, the dredge captain, besides his supervisory duties, actually handles the levers which direct the movement of the boom or crane to which the bucket is attached. (Record, 667, 11; 665, 6.) The cranesman is charged with the duty of seeing that the bucket is properly pushed into the earth or mud in such a way that a full load may be removed and not so hard as to cause the machinery to break. It is his duty to govern the depth to which the bucket is allowed to sink before it commences to dredge, gauging the depth by a standard scale or tide board placed on some near-by object. When the required depth is reached he presses a lever which stops the further descent of the bucket and retains the pressure until the bucket has been drawn up after the completion of its cut. He assists in guiding the bucket over the scow and pulls the rope which opens the door of the bucket and empties it. His helper assists him in the performance of these duties. The crane tenders assist about the deck when the dredge is not working. They are called

upon for general duties in case of a breakdown. Their duty is to tend the crane by which the scoops or buckets are operated and to do such other work around the vessel as they may be called upon to do. (Record, 667, 12; 664, 9, 10.)

The deck hands do whatever work about the deck the captain directs. They are not expected to possess the ability to direct other men. They handle the lines, clean the decks, attend to lights, and do other work of a similar nature. (Record, 667, 12, 24; 664, 11, 12.) The engineer of the dredge is said to have the same duties as an engineer on any vessel. He attends to the engine all the time and has under him an assistant engineer, called an oiler, who spells him from time to time, and also one or more firemen. (Record, 664, 10.) The duties of the firemen are to keep up steam and feed the fires. In No. 667 it is said that the firemen upon the dredge there was really an engineer. It was his duty to attend to the fires and keep up the steam properly, and also, as engineer, to take charge of the engines on the dredge, all of which he was to keep oiled and in operative condition. He made the necessary repairs on them. Firemen on dredges are recruited from firemen on towboats and other vessels. (Record, 667, 12.) The masters and engineers of dredges are not licensed by the United States authorities, but the masters and engineers of the tugs are all licensed by the United States. (Record, 664, 15.) The duty of the scowman is to shovel the mud away from the sides of

the scow while the dredged material is being dumped into it and to keep the scows clean. After the scow has been filled with dredged material it is towed by one of the tugs to the dumping ground. The scow having no rudder is steered by the motion of the towboat and by the manner in which the scowman from time to time changes the position of the towlines—lengthening and shortening them. Upon arriving at the dumping ground he opens the pockets and sees that the dredged material, which often sticks to the pockets, is completely dumped, and then he assists in the management of the scow, as above indicated, on the return trip to the dredge. (Record, 667, 20–21; 664, 8.)

The mate of the dredge has general charge and control of its deck and must be able to fasten, handle, and care for lines so as to locate the scows that they may be in position to receive the material removed without undue damage to the dredge. He must be able to care for, splice, and generally handle the hawsers and lines, and be able to direct deck hands. He directs the fastening and handling of the lines. Primarily he performs no part of this work with his own hands, that being the business of the deck hands, although he sometimes assists. (Record, 667, 12.)

The duties of the engineer and firemen upon the tugs are similar to those upon the dredges. The captain of the tug must know the harbor and river upon which he is working and in general be able to navigate his vessel. He must be licensed

by the local inspectors under the United States statutes as a pilot. He decides when the conditions of the weather are proper or not, as the case may be, to make a trip to the sea dump. He must further have the special knowledge and ability to successfully tow scows, which is stated to require a skill not ordinarily possessed by captains of ordinary boat-towing tugs. (Record, 667, 13, 19; 666, 8–10.) There is evidence that all of the crew of the dredge, including the scowman and the dredge captain, perform manual labor (Record, 664, 16); and that it is desirable and perhaps essential that the crew of the dredge and the scowmen should have seafaring knowledge in order to meet weather conditions that may arise at any time, and that it is the practice to recruit the crews for dredges from the merchant marine. (Record, 667, 19.)

In these cases it is admitted that these defendants were working under contracts with the United States and that they knew that the employees named worked more than eight hours.

The places where the defendants were working were not owned by and had never been ceded to the United States, and were not under its control except so far as the navigable waters in Boston Harbor are under its control. The waters upon which the defendants were working are navigable waters. (Record, 667, 27, 28; 664, 15.)

NATIONAL EIGHT-HOUR LAW LEGISLATION.

Act of August 1, 1892 (27 Stat. 340):

CHAP. 352. An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

SEC. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia, who shall intentionally violate any provision of this act, shall be deemed

guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

SEC. 3. The provisions of this act shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or to limit the hours of daily service of laborers or mechanics engaged upon the public works of the United States or of the District of Columbia for which contracts have been entered into prior to the passage of this act.

Approved, August 1, 1892.

Revised Statutes, section 3738, act of June 25, 1868 (15 Stat., 77):

SEC. 3738. Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the Government of the United States.

Act of March 30, 1888, chapter 47 (25 Stat., 57):

And the Public Printer is hereby directed to rigidly enforce the provisions of the eight-hour law in the department under his charge.

Act of January 12, 1895, chapter 23, section 47 (28 Stat., 607):

SEC. 47. The Public Printer shall cause work to be done on the public printing in

the Government Printing Office at night as well as through the day when the exigencies of the public service require it, but the provisions of the existing eight-hour law shall apply.

By special acts eight hours constitutes a day's work for letter carriers.

Act of May 24, 1888, chapter 308 (25 Stat., 157).

Act of June 2, 1900, chapter 613, section 1 (31 Stat., 257).

ARGUMENT.

THE EIGHT-HOUR LAW CONSTITUTIONAL.

The first Federal eight-hour law was enacted in 1868 (act June 25, 1868, chapter 72, 15 Stat., 77, now Rev. Stats., sec. 3738, ante page 16). This statute was twice before this court, but in neither case was it necessary to pass upon its validity.

United States v. *Martin*, 94 U. S., 400.

United States v. *Driscoll*, 96 U. S., 421.

In those cases the statute was considered as "in the nature of a direction from a principal to his agent, that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest." Therefore, contracts fixing a different length of time are legal and binding. (Martin's case, at page 404.) And the statute does not apply to the employees of an

independent contractor. (Driscoll's case, at pages 423, 424.)

In consequence of the interpretation of the law given in those cases, and because of the absence of a penal provision, the act of August 1, 1892, chapter 352 (27 Stat., 340), was passed, preserving the principle of the prior law, to insure its effective execution.

The validity of neither statute has ever been questioned in the courts or by executive officers.

United States v. *Ollinger*, 55 Fed. Rep., 959.

United States v. *Jefferson*, 60 Fed. Rep., 736.

United States v. *John Kelso Company*, 86 Fed. Rep., 304.

United States v. *San Francisco Bridge Company*, 88 Fed Rep., 891.

12 Opin. A. G., 530; 13 ib., 29; ib., 424; 14 ib., 37; ib., 128; 16 ib., 58; 17 ib., 341; 18 ib., 389; these opinions being upon the act of 1868. The foregoing decisions and the following opinions being upon the act of 1892: 20 Opin. A. G., 445; ib., 454; ib., 459; ib., 487; ib., 500; 21 ib., 32; 25 ib., 441; ib., 465; 26 ib., 1; ib., 30; ib., 36; ib., 64.

In 25 Opin. A. G., 441, Mr. Justice Moody, then the Attorney-General, had occasion to consider whether the act of 1892 applied to the employment of laborers and mechanics in the construction of the Panama Canal; and in coming to the conclusion

that it did, in answer to an objection that his construction gave the law an operation beyond the territorial jurisdiction of the United States, he said (p. 444):

> But although Congress has no power to enact laws which shall operate beyond the jurisdiction of the United States, still it has the power to determine what shall be the length of a day's work of any and all persons employed by the Government or by contractors upon any public works undertaken by the United States anywhere. Congress may, if it chooses, fix the hours of labor on the work of the United States wherever it is conducted and make the law binding on the officers of the United States and, through the agency of a contract, upon contractors with the United States. In other words, it may direct the action of its own officers and agents and dictate the terms of the contracts made with the Government. The law thus becomes operative everywhere, not because it operates over territory beyond the jurisdiction of Congress, but because Congress has full jurisdiction over the officers and agents of the United States and full authority to prescribe the terms of any contract which shall be entered into by the United States.

That opinion has been sustained and affirmed by acts of Congress. (Act February 27, 1906, chapter 510, 34 Stat., 33; act June 30, 1906, 34 Stat., 669.) It expresses precisely the theory upon which

Congress enacted this law—that the Government has the same right that any employer of labor has to dictate the terms upon which its work shall be conducted. (See the Senate and House reports on this act, Appendix, pp. 45, 48, and the debates, Cong. Rec., vol. 23, pp. 451, 452, 5723, et seq.)

It will be observed that the law is not of general application: Congress has not attempted to prescribe the hours of labor to be observed by contractors generally; it only applies to the officers of the United States and of the District of Columbia, and to those who enter into contracts for the performance of labor upon the public works of the United States or the District of Columbia. For this reason we need not consider the class of cases of which *Lochner* v. *New York* (198 U. S., 53) is a type.

Furthermore, the statute (section 3) excepts from its operation contracts entered into before the passage of the law, so, if that would be otherwise an objection of which these appellants could avail themselves, it can not be urged here.

The question is, then, whether the Government as an employer may require, under penalty, its officers and its contractors, who have engaged themselves upon its public works, to see that the workmen under their charge or in their employ shall not be required or permitted to work over eight hours or any number of hours or minutes in a calendar day.

The contention is that this act curtails the lib-

erty of both the workman and the contractor; and the fifth amendment is invoked as forbidding such legislation.

It provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

The fourteenth amendment is in the same words, and under that amendment a State law embodying a principle precisely like that contained in the national law has been sustained, over dissent by three members of the court, none of whom gave the reasons therefor.

Atkin *v.* Kansas, 191 U. S., 207, controlling.

Atkin, who had entered into a contract with the city of Kansas to do all the labor and furnish all the materials for the construction of a brick pavement in that city, was found guilty of a violation of the State eight-hour law, having required and permitted one of his laborers to work ten hours on a certain day, and brought his case to this court, where he made the following objections to the statute:

(1) It deprives a contractor of his liberty and his property without due process of law; (2) it is class legislation; (3) it encroaches upon the right of the employer and the employee to contract as they see fit; (4) it is not a valid exercise of the police power. There was one other objection, based upon the fact that the law applied to contractors

with municipal corporations, which need not be mentioned.

From a consideration of the State statute, which is set out in 191 U. S., at pages 207 et seq., it appears that it prescribed the hours of work for laborers, workmen, and mechanics employed by the State or any governmental subdivision thereof, such as counties, cities, and townships, directly, or indirectly through the interposition of a contract. By the second section it was made unlawful for any contractor for the performance of any work or the furnishing of any material manufactured in the State, for the State or any of the divisions thereof named, to require or permit the classes of employees named to work more than eight hours in a calendar day, except in certain cases enumerated; and by the third section officers of the State or any division thereof and contractors were subjected to penalties, fine or imprisonment, or both, for failure to observe the law's command. This statute was enacted one year before the national statute, was referred to in the debate (Cong. Rec., vol. 23, p. 5731), and is so like it that it must be supposed that the Congress used it as a model.

The conviction of the appellant was sustained and each of his contentions was overruled. The basis of the decision was thus stated (p. 224):

> We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the

conditions under which it will permit work of that kind to be done. Its action touching such a matter is final, so long as it does not, by its regulations, infringe the personal rights of others, and that has not been done.

The phrase "public works of the United States" includes the work upon which appellants were engaged.

The very work upon which the Eastern and Bay State Dredging companies were engaged was authorized by statutes entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," which enacted "That the following sums of money be, and are hereby, appropriated * * * for the construction, etc., of the public works hereinafter named:" * * *

> Improving harbor at Boston, Massachusetts: For maintenance and general improvement, one hundred thousand dollars.
>
> For improving said harbor in accordance with the report submitted in House Document numbered one hundred and nineteen, Fifty-sixth Congress, second session, by providing channels thirty-five feet deep, * * * six hundred thousand dollars.
>
> (Act of June 13, 1902, chapter 1079, 32 Stat., 331, 332.)
>
> Improving harbor at Boston, Massachusetts: Continuing improvement and for maintenance, one hundred thousand dollars.
>
> (Act of March 3, 1905, chapter 1482, 33 Stat., 1118.)

The work upon which Ellis was engaged was authorized by act of March 3, 1905, chapter 1481 (33 Stat., 1092, 1101), entitled "An act making appropriations for the naval service," etc., under subhead "PUBLIC WORKS, BUREAU OF YARDS AND DOCKS," as follows:

> NAVY - YARD, BOSTON, MASSACHUSETTS: * * * approach to dry dock numbered one, forty-three thousand one hundred dollars; * * *

And, both before and after the passage of the act of 1892, works of a character like those upon which each of the appellants was engaged have been denominated "public works."

> 20 Stat., 152; ib., 363; 21 Stat., 8, 180, 468; 22 Stat., 191; 24 Stat., 581, 584; ib., 310; 25 Stat., 400, 462, 813; 26 Stat., 193, 426, 803; 27 Stat., 88, 240, 721; 28 Stat., 130, 831; 29 Stat., 202, 367, 654; 30 Stat., 377, 1030, 1121; 31 Stat., 692, 1116; 32 Stat., 331; 33 Stat., 333, 1101, 1117.

In *United States* v. *Jefferson* (60 Fed. Rep., 736) it was held that the removal of obstructions to navigation was public works within the act of 1892; and in *United States* v. *San Francisco Bridge Company* (88 Fed., 304) it was held that it is immaterial that a violation of that act is committed upon territory over which a State has political jurisdiction, if the public work is lawfully being constructed thereon for the United States.

In 26 Opin. A. G., 30, 34, it was said that dredg-

ing, and the mere deepening of a channel, is public works, because "the paramount control by the United States over the marine belt, harbor areas, and navigable waters is akin, in the interest created and in its permanence and completeness, to a title to real estate and ownership of fixed structures."

A similar intimation is contained in 23 Opin. A. G., 174, 176, to which reference is made in 26 Opin, supra, 32.

The suggestion that the works upon which the Bay State and the Eastern Dredging companies were engaged were not public works, within the law, because they were conducted upon land within the territorial limits of a State, not owned by the United States, in view of the definition of public works which Congress itself has long declared, and of the foregoing authorities, is not sound, and can not be maintained.

It was work for which the Congress could lawfully appropriate money, and it is competent to the Congress to define by certain enactments, even later in date than other acts, the words and phrases used in the other acts. (*Johnson* v. *The Southern Pacific Company*, 196 U. S., 1, 21, and cases cited.)

The exception "in case of extraordinary emergency" only applies to sudden, unexpected happenings, not of the customary, usual, or regular kind, demanding prompt action to avert imminent danger to life, limb, health, or property.

The appellant, Ellis, rests his appeal largely upon the proposition that an emergency situation existed

at the time he worked his laborers more than eight hours. He contends that the dry dock, although not in an extremely dangerous condition, was so constructed that a possibility of danger to a battle ship in the operation of warping it into the dock for repairs existed; that the extension of one of the dock's sides, the approach which he was constructing, was designed to remove and would remove that scintilla of danger; and that, because the fleets of the United States are frequently in the waters near the public work upon which he was engaged and are liable at any time to need the services of this dock, his work was emergency work within the exception to the law. Analyzed, this contention affirms that there may be such a situation as a continuing extraordinary emergency, one which is ever present. He contends, also, that, as he was delayed in obtaining necessary material and might have become liable to pay certain damages stipulated in the contract for failure to complete the work within the time specified, he was justified in working men over time.

In the Century Dictionary the words "extraordinary" and "emergency" are thus defined:

> Extraordinary. 1. Being beyond or out of the common order or rule; not of the usual, customary, or regular kind; not ordinary.
>
> 2. Not pertaining to a regular system or sequence; exceptional; special.
>
> 4. Exceeding the common degree or meas-

ure; hence, remarkable; uncommon; rare; wonderful.

Emergency. 2. A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances.

3. A sudden or unexpected occasion for action; exigency; pressing necessity.

To the same effect are the definitions in the following:

Standard Dictionary, Funk and Wagnalls Company; Webster; Worcester.

Throughout all these definitions there runs the idea of suddenness; by itself alone the word "emergency" indicates that the situation must present itself so quickly that prompt and immediate action is called for, and when to this word is joined another of the most emphatic words in the language it is clear that the Congress not only did not intend to make the exception broad, but did intend to make it extremely or extraordinarily narrow.

The definition given by the judge in the court below in the Ellis case (Record, 567, p. 25) is in accord with the dictionary definitions, and it has received the approval of Mr. Justice Moody, when Attorney-General, and of the present Secretary of War, as appears by the official orders appended to this brief, pages 68, 71, 73.

It was reaffirmed by Judge Dodge in the cases against the two dredging companies (Record, 667,

39; 664, 26) and was adopted by Judge Thompson in the case of *The United States* v. *The Sheridan Kirk Contract Company* (149 Fed. Rep., 809, 813, et seq.), Advance Parts, No. 3, now pending in this court, but not advanced to be heard with these cases.

The view which we take of the meaning of this phrase is confirmed by an expression of opinion in the debates.

It was said (Cong. Rec., vol. 23, p. 5729):

> * * * in each case it is a question of fact for the jury to determine whether there was an "extraordinary emergency" or not. In any given case they may have to decide whether the clouds that arose in the west and the thunder and the lightning indicated a storm or whether they did not. If the storm blew over and the work upon which the men were engaged was not injured, then the case was not a case of extraordinary emergency, and the contractor or Government officer is to be convicted and sent to the penitentiary for six months.

And in other places it is intimated that if there are conditions of haste or exigencies of mere time or business risks well understood by the contractor when he made his contract the intent is that he must overcome them by the employment of two or more eight-hour shifts. (Cong. Rec., vol. 23, pp. 5724, 5728.)

As Judge Thompson pointed out, the phrase "a continuing extraordinary emergency" is self-con-

tradictory. (149 Fed. Rep., supra, at p. 816.) An emergency is an occasion for prompt action, and an extraordinary emergency is an unusual, rare, uncommon event, occurring only at intervals. In Ellis's case it appears that he worked his men overtime upon the anticipation of events which he conceived as likely to happen—that a war ship might be in the waters near the dock and sustain an injury requiring the service of the dock and that he might possibly incur a pecuniary loss—but it does not appear that his anticipations were realized. Urgent situations which can be foreseen in time to avoid the necessity of overtime work must be guarded against solely by putting additional shifts at work. If his theory of the meaning of the emergency clause be adopted, it will practically repeal the statute, for it is conceivable that an occasion may arise at any time requiring a battle ship to enter any navigable stream upon which dredging work is being done; that war may break out, necessitating the immediate use of any dock or fortification under construction; that floods may come to demolish a dam; that the condition of the labor and material markets may cause delay; but the mere fact that such conceptions may occur to the mind or that the latter is realized do not authorize overtime work.

One of the purposes of the statute was thus stated in the Senate report, infra, page 47:

> The American people desire that all classes of society composing the Republic shall be

> educated; that those who labor shall not only be well fed and clothed, but shall enjoy some of the luxuries that make life worth living.
>
> It is only by conferring such benefits that men become more ambitious for themselves, but interested in the welfare and prosperity of the nation.

And from the House report, infra, page 48, it appears very clearly that this act was designed to secure better citizens by promoting the educational, social, and moral elevation of the industrial classes. And the debates are to the same effect. (Cong. Rec., vol. 23, pp. 5724 et seq.; Appendix, vol. 23, pp. 452 et seq.)

To discover the evil which a statute is designed to remedy, the court will read committee reports and the debates to know the situation as it existed and was pressed upon the attention of the Congress.

> *United States* v. *Union Pacific Railroad*, 91 U. S., 72, 79.
>
> *Church of the Holy Trinity* v. *United States*, 143 U. S., 457.
>
> *United States* v. *Laws*, 163 U. S., 258.
>
> *American Net and Twine Company* v. *Worthington*, 141 U. S., 468.
>
> *Dunlap* v. *United States*, 173 U. S., 65.

In view, therefore, of the helpful purpose of this act, both to the Government and to the industrial classes, the exception in it should be confined within the narrowest bounds which the words used permit; and giving to those words their ordinary

meaning, as defined above, it must be concluded that Ellis has not brought himself within them. The cases of the two dredging companies are *a fortiori;* and, indeed, they only faintly suggest that their cases may be brought within the emergency exception.

Attention should be called, however, to one case, the only one which has been found where the emergency exception in an eight-hour law has been before a court for consideration, for it has been thought to be opposed to the conclusion to which we have come as to the meaning of the exception in the national law. (*People* v. *Waring*, 64 N. Y. Suppl., 865; reported also 52 App. Div. N. Y., 36, 1900.)

A State law, applying to the city of Olean, made eight hours the length of a legal day's work, except "in cases of extraordinary emergency caused by fire, flood, or danger to life or property." That city, it appeared, received its water supply from the action of a single pump, which had to be operated continuously to meet the demands of its inhabitants. Its continuous use made accidents to it, which would have produced a water famine, extremely likely, and, accordingly, the water commissioners entered into a contract for the installation of an additional pump, under which the city was to do the excavating necessary for its reception, and from June to November, 1899, a laborer was employed by them in making the excavation. Under these circumstances and upon this evidence

a proceeding was had before the authorities of the city with a view to have the commissioners removed for a violation of the eight-hour law, and for other acts done in disregard, as it was claimed, of other duties incumbent upon them. This proceeding resulted in the exoneration of the commissioners, and a writ of certiorari was obtained to review the action of the city authorities. The case presented to the court, therefore, was not one which called for the expression of an opinion whether or not the commissioners had been guilty of a technical violation of the law; it was not a criminal prosecution, but one which merely required a determination whether the city authorities had failed grossly in their duty by not removing them. After alluding to the facts above stated, and concluding from them that it was clearly the duty of the commissioners to take extraordinary precautions, it was said:

> * * * inasmuch as it is not pretended that they willfully or intentionally violated the law, we think the case, so far as this particular feature of it is concerned, may be dismissed without further comment.

In other words, the court considered that there might have been a technical violation of the law, but that if there had been it was not sufficiently grave so that it could be said that the offenders should be deprived of their offices in consequence of it. However, if that view of this case be not correct, it is submitted that it should not be fol-

lowed in construing the national law, for the reasons above given.

The application of the words "laborers and mechanics" to employees engaged in ordinary dredging operations upon the ordinary nonseagoing dredge and attendant scows and tugs.

The act of 1868 contained, in addition to the words "laborers and mechanics," the word "workmen," but as that is merely a generic term, expressing nothing beyond the other words, it was rejected as superfluous when the act of 1892 was adopted.

We are to consider how far the terms "laborers and mechanics" are applicable to the following employees engaged in an ordinary dredging operation: Captain, mate, engineer, fireman, cranesman, cranesman's helper, and deck hands of the dredge; captain, mate, engineer, and fireman of the tug which tows the scows to the dumping ground; and the scowman, who assists in the management of the scow on its trips and assists in receiving the dredged material and in its deposit at the dumping ground.

1. The term "laborers and mechanics" applies to all who come within the ordinary meaning of those words, irrespective of the manner in which they are paid.

In 12 Opin. A. G., 530, 533, Attorney-General Evarts stated that "The plain import of the law is that a laborer, workman, or mechanic in the em-

ploy of the Government, whether hired by the day, week, or month, shall only be required to work eight hours a day to earn his daily, weekly, or monthly wages, whatever these may be." However, in 14 Opin. A. G., 128, Acting Attorney-General Hill, without noticing the opinion of Mr. Evarts, and after saying that the act should receive a "broad and liberal construction," said that it was "limited to employees who are paid a day's wages for a day's work;" but in 18 Opin. A. G., 389, 391, in stating the effect to be given to that opinion, it was said cautiously that "All persons who are employed and paid by the day are included within the act * * *." In view of the practice of the Government not to pay daily wages, but to pay each month or week, and to the absurd results of such a construction, it is impossible to suppose that the act of 1892 only applies to and benefits those who are employed and paid by the day. Such a construction would enable the purpose of the act to be defeated by any contractor by employing and paying his employees by the week or month.

No decision of a State court defining these words in this connection has been found except *Billinsley* v. *Marshall County* (5 Kan. App., 435), where it was held that a person who contracted, under the Kansas act, which was considered in *Atkin* v. *Kansas* (191 U. S., 207), with a county to do certain work for a monthly sum could not recover a greater sum than that agreed upon, there

being no emergency, by showing that in the performance of his contract more than eight hours work a day was required of him. Beyond the requirements of the case it was said (p. 436):

> The writer is of opinion that the law in question applies only to people who work by the day, and not to those making contracts of a certain amount of work for so much money.

That was the obiter opinion of a single judge; and it is impossible to believe that a like construction will be given to this law. If that view be taken, then in truth this so-called law is no law at all.

The opinions of the Attorney-General on the act of 1892 have followed the opinion of Attorney-General Evarts.

In 25 Opin. A. G., 465, Attorney-General (now Mr. Justice) Moody held that the act applies to all those paid by the year, month, or day, who are in fact laborers and mechanics.

The act of 1892, therefore, applies to any who come within the ordinary meaning of the words used, irrespective of the manner in which they are paid.

2. *The ordinary meaning of the terms "laborer and mechanics."*

There have been few instances in which the meaning of these words in the act of 1892 has been determined.

In *United States* v. *Jefferson* (60 Fed. Rep., 736), which was an indictment against the master of a Government snag boat engaged in removing obstructions to navigation for requiring laborers to work more than eight hours in violation of the law, the alleged laborers were the crew of the boat, and the jury were charged that deck hands and seamen, while engaged in the work of removing the obstructions, were laborers.

In *United States* v. *Martin* (94 U. S., 200) it was assumed that a fireman at the steam boilers at the Naval Academy, Annapolis, was a "laborer, workman, or mechanic" within the act of 1868.

In 26 Opin. A. G., 64, it was held that firemen, blacksmiths and their helpers, and pumpmen employed on irrigation works for the reclamation of arid lands are laborers or mechanics, within the act of 1892.

Locomotive engineers have been held to be mechanics under statutes giving laborers and mechanics the advantage of mechanics' liens, or exemption from garnishment proceedings, or some similar preference.

Sanner v. *Shivers*, 76 Ga., 335 (1886).
State, ex rel. I. X. L. Grocery Company, v. *Land*, 108 La., 512.

A fireman or stoker on board ship is clearly a laborer, and it so has been held. (*Wilson* v. *Zulueta*, 14 Q. B., 405, 1849.)

The application of the act of 1892 to the Government Printing Office is a further proof that it ap-

plies to those, like engineers and firemen, who are engaged in work upon machines and engines. (Act of January 12, 1895, chapter 23, section 47 (28 Stat., 607), ante, pp. 16, 17.)

From the foregoing authorities it seems clear that deck hands, scowmen, cranesmen and their helpers, and firemen, who perform manual labor, and engineers, who perform mechanical labor, are within the ordinary meaning of the term "laborers and mechanics." It appears also, upon the facts stated in the record, that the dredge captain performed manual labor in tending the engine which raises and lowers the shovel, and therefore it seems that it was unlawful to require or permit him to serve more than eight hours on the day named, as the verdict establishes. But it is said that the persons named are sailors, employed on shipboard; that their employment is peculiar; that they do not come within the ordinary definitions; and that this has been the construction placed upon the act by the War Department.

3. *The employees named are not seamen.*

We are informed that there are two distinct types of dredges in use: Self-propelling seagoing vessels, equipped with suction pumps and bins for retaining dredged material, which slowly move up and down the channel, sucking into the bins the mud which is later dumped at the place of deposit, and the ordinary dredge, which is not self-propelling, which must be towed about from

place to place, and which remains stationary during its operations. It is with the latter class that we have to do here.

A dredge and scows have been held to be vessels, and therefore not subject to duty under a tariff act, but that decision rests upon the definition of the word "vessel" in Revised Statutes, section 3, under which any water craft used, or capable of being used, for transportation is a vessel. (*The International*, 89 Fed. Rep., 484.) Before the general definition was made it is quite clear that such craft would not have been considered as vessels for the reason that they are not self-propelling.

United States v. *The Ohio*, 27 Fed. Cas., No. 15915.

United States v. *The Pennsylvania Canal Boat*, 27 Fed. Cas., No. 16027.

A dredge fixed in its place and operating in deepening a channel is exactly like a steam shovel operating upon an excavation on land. The crew of the dredge while it is at work and while they are assisting in its operations are no more seamen than the men who operate a land steam shovel. If their employment can be said to be peculiar, it is only while the dredge is proceeding from one port to another.

A consideration of the reasons for the enactment of the national eight-hour law confirms this view.

4. *Evil designed to be remedied by the eight-hour law.*

In the committee reports (infra, pp. 47, 54) reference is made to the great advance and development of labor-saving machinery during the thirty years preceding 1892. It is said that, by reason of these mechanical inventions of American genius, the labor market had become congested, and that there was not sufficient remunerative employment for all who were willing to labor. That was the situation as it existed, and was pressed upon Congress. (*United States* v. *Union Pacific Railroad*, 91 U. S., 72, 79.) From the debates and from the definitions of "public works," as shown, supra, page 24, it clearly appears that Congress intended this law to apply to dredging operations; hence, taking into consideration that fact and the evil which the statute was designed to cure, there is no difficulty in determining that those who are engaged upon the labor-saving device called a dredge, who come within the ordinary definition of "laborers and mechanics," must not be permitted or required, upon ordinary occasions, to work overtime. And it is just as important that the engineer, his fireman, the deck hand, the cranesman and his helper, and the scowman should have time to be with their families, to educate themselves for the duties of citizenship, as any other of the industrial or laboring classes, as the committee reports denominate them, and it is essential that they should not be worked so

long as to prevent their trade associates from finding employment in the trades which they have learned.

5. *Executive interpretation of the eight-hour law.*

Before considering the action of the War Department we submit that the meaning of the act, its application to dredging operations and to the crews and engineers engaged thereon, is so plain that the doctrine that weight is to be given to the executive interpretation of statutes can not be invoked. "A custom of the Department, however long continued by successive officers, must yield to the positive language of the statute." (*Houghton* v. *Payne*, 194 U. S., 88, 100.)

But it can not be shown that there has been any settled construction by the War Department. Since the passage of the act of August 13, 1894 (28 Stat., 278), requiring contractors upon the public works to give bond for the protection of persons furnishing materials and labor, it has required bonds to be given by contractors upon dredging operations. (See Appendix, p. 63.) It has been the practice, down to July, 1906, for the Government to work the crews of its dredges more than eight hours; but there has been no authority for this course. In none of the orders which the War Department has issued—and the substance of all of them, so far as material, is in the Appendix, pages 67–84—can there be found the slightest authority for that action, except the

Army regulation (infra, p. 67), which, as shown hereafter, is based upon an erroneous interpretation of an opinion of Attorney-General Miller. The eight-hour day is now being observed upon dredges, so far as deck hands, foremen, machinists, blacksmiths, and ordinary laborers are concerned. The law is held not to apply to masters, pilots, steam engineers, enginemen, stokers, stewards, cooks, waiters, and the like, "whose work is not continuous, and who may be called upon at any or occasionally at all hours of the day to perform work." (See Appendix, p. 63.) In the circulars and memoranda, at pages 68–84, it will be seen that the view now taken by the Department is that the crew of a Government dredge of the class under consideration in these cases is within the eight-hour law. There is not, therefore, at the present time any executive action which is opposed to the view which we take of the proper construction of this law, except that the master of the dredge and the engineer and fireman are not regarded as laborers and mechanics—and that decision may be justified because of methods of work which are different from those employed by contractors, although this is mere surmise—and the opposing policy which formerly prevailed has been repudiated.

Finally, it is to be noted that the action of the Department has been based entirely upon an opinion of Attorney-General Miller, 20 Opin. A. G., 459 (Appendix, p. 64), and upon what we believe to be an erroneous construction of that opinion.

The question submitted by the Secretary of War was: Does the eight-hour law include teamsters, watchmen, engineers, and firemen employed in the public service of the War Department, and all engineers, firemen, deck hands, mates, and seamen on Government vessels in the service thereof? Upon what kind of vessels, whether dredges or what we ordinarily mean by the term vessel, was not disclosed. And properly, therefore, the Attorney-General said that he could not answer the questions, for they depended upon statements of fact not made. And then he said (p. 463):

> If the employees named are ordinary laborers or mechanics, working for the Government for wages under ordinary conditions, the statute would seem to apply. At the same time, it is quite apparent that * * * as to others, as, for instance, sailors or others on shipboard, or teamsters, their employment being peculiar, they might well be held to be, as a matter of fact, neither laborers nor mechanics within the meaning of this law.

As has been shown there is no warrant for saying that a dredge, while engaged upon the actual work, is a vessel, or that the crew are "sailors on shipboard."

We submit that upon the facts stated in these records the enginers, firemen, deck hands, cranesmen, and helpers, scowmen, and dredge master, are laborers or mechanics within the law; that the ordinary definition of the term includes them com-

prehensively and completely; and that the executive action, now abandoned or at least not completely insisted upon, can not control the plain meaning of unambiguous words.

The statute was expected to lend an impetus to similar legislation by the States. It is a part of the world-wide movement for shorter hours of labor. It should receive a liberal interpretation that it may accomplish the good and destroy the evil for which it was passed. There are particular reasons why the crews of dredges, living a secluded, tiresome life, should receive the advantages of the liberal educational spirit pervading this statute. The dredging operations are, for the most part, conducted near shore, and there are to be found libraries and society, from which under the present system, whereby their lives are passed almost entirely on the dredge, they are debarred. It is not enough to say that they have exercised a free choice in the method and manner of their work—that may or may not be always the fact—for the Government is interested and has required that they have the time and opportunity to become better fitted to solve the questions which the people themselves are called upon to solve under our system of Government.

CHARLES J. BONAPARTE,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.
OTIS J. CARLTON,
Special Assistant to the Attorney-General.

APPENDIX.

(1)

IN THE SENATE OF THE UNITED STATES.

JULY 16, 1892.—Ordered to be printed.

Mr. CAREY, from the Committee on Education and Labor, submitted the following

REPORT:

(To accompany H. R. 8537.)

The Committee on Education and Labor, to which was referred the bill (H. R. 8537) entitled "A bill relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," having had the same under consideration, recommend its passage.

The bill, if it becomes a law, will be, in effect, an amendment of the existing eight-hour law, which provides (sec. 3738, U. S. Rev. Stats.) "that eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may hereafter be employed, by or on behalf of the Government of the United States."

It is claimed by the labor organizations of the country and by individual laborers, workmen, and

mechanics that have from time to time been em ployed on behalf of the Government of the United States that the violation of the eight-hour law by the officers of the United States has been quite as common as its enforcement; that in many instances those employed by the Government have been compelled to work ten hours a day and have been paid the same compensation as those who were only required to labor eight hours a day on similar work. The debates that took place in the two branches of Congress show that it was the intention of Congress that the law should be effective.

The bill under consideration, it is believed, contains provisions which will compel its enforcement. It will in effect extend the provisions of the existing law to those employed by the District of Columbia and to any contractor or subcontractor upon any of the public works of the United States or of the public works of the District of Columbia. It affixes a penalty for any violation of the law. It makes it unlawful for any officer of the United States Government or of the District of Columbia or any contractor or subcontractor upon any of the public works of the United States to require or permit any laborer or mechanic to work more than eight hours on any calendar day, except in cases of extraordinary emergency. It excepts from its provisions all contractors or subcontractors that have contracts upon the public works of the United States that were entered into prior to the passage of this act.

The existing eight-hour law now upon the statute books was enacted twenty-four years ago. It should have been enforced. The preponderance of testimony that has been given from time to time

establishes the fact that the law, if observed, is a good one. It is a question whether men working at hard labor eight hours each day do not accomplish in a year as much as those who are compelled to labor ten hours on each working day. The inventions and improvements in machinery, which enable men to do a far greater amount of work in a given time than under old methods, suggests the wisdom of a change in our customs that will shorten the number of hours now devoted each day to manual labor.

The American people desire that all classes of society composing the Republic shall be educated; that those who labor shall not only be well fed and clothed but shall enjoy some of the luxuries that make life worth living.

It is only by conferring such benefits that men become more ambitious for themselves, but interested in the welfare and prosperity of the nation. The United States to-day is looked upon as the workingman's paradise. No other country has so zealously protected the laboring classes in the enjoyment of their rights. In return the workman and mechanic have contributed to the development of our vast resources and wealth, and to the marvelous invention of machinery we owe the increased power of man to do the work of the world. In view of such achievements, who shall say that the laborer, workman, and mechanic is not entitled to share in the benefits that have been conferred in a great measure through his efforts?

The committee believe the bill if passed will afford an opportunity to fully test the eight-hour law.

(2)

HOURS OF LABOR FOR MECHANICS AND LABORERS.

MAY 3, 1892.—Referred to the House Calendar and ordered to be printed.

Mr. TARSNEY, from the Committee on Labor, submitted the following

REPORT:

(To accompany H. R. 8537.)

The Committee on Labor, to whom was referred sundry bills of the House, namely, H. R. 257, H. R. 276, and H. R. 442, respectfully submit the following:

The tenor and purpose of all of said bills was to establish and secure a limitation of the hours of daily service of laborers and mechanics engaged in the service of the United States and of the District of Columbia to eight hours in any one calendar day.

The principle embraced in these measures and in the substitute herewith submitted is not new nor without the sanction of precedent. The authority of the Government by law to regulate and limit the hours of service of those in the immediate and direct employment of the Government is undisputed, nor is it contended that no authority exists in the Government that may be exercised to restrict and limit the hours that laborers may be employed upon the works of the Government under the employment of contractors for the doing of such works.

Among the many industrial problems which challenge the notice and thought of the age, none

attract more universal attention or deserve greater consideration than that which involves the necessity for and practicability of legislation interfering with and restricting the rights of the citizen in relation to contracts for employment and looking thereby to an enforced shortening of the hours of daily toil.

The educational, social, and moral elevation of the industrial classes being involved in this problem, its importance commands not only the interest and attention of such classes, but consideration by the best professional thought of the world. Its agitation in the centuries which have passed since mankind emerged from the semibarbarism of the feudal ages has resulted in shortening for the wage-worker his hours of daily toil by nearly one-half, and no argument is required to demonstrate that universal good has resulted therefrom. The conditions that have long made this a commanding question in European countries and which have resulted in the almost universal organization of the industrial classes of those countries into guilds and trade and labor unions, with the view of obtaining through the coercive force of such organizations that redress of grievances and amelioration of conditions which the citizen of this Republic should be taught to seek to obtain only by the force and sanction of public law, have but recently begun to develop in this country and to assume proportions demanding legislative action.

The changes in the industrial conditions of the United States during the past quarter of a century amount almost to a revolution and have been so rapid that those who recognize and acknowledge such changes scarcely realize the causes which have

produced the same, much less to crystallize public thought upon measures for the redress or alleviation of the evils resulting therefrom.

But little more than thirty years ago this country was new and practically undeveloped. The implements of industry were crude and little effective. Muscular power was, in the main, the force relied upon to move the industries of the country. By comparison labor was plentiful and laborers scarce. Whether in the mill, at the factory, or upon the farm, whoever sought, with willingness and capacity to labor, could find employment. Involuntary idleness was then unknown. Idleness *per se* was then a crime. The word "tramp" was then unread in our language, and no statute to punish alike under that designation the unfortunate deserving with the viciously criminal idlers had yet blackened the legislative records of any State in the Union. "Slums," "sweating systems," "contract labor," now familiar words and designations marking and expressing existing social and industrial conditions, had not then been imported from Europe. The age of cheap and rapid trans-Atlantic transportation had not yet come to annihilate time and distance and place us at the gateways of exit for the overcrowded and discontented millions of the East. But suddenly, so suddenly as to be scarcely perceived and as yet scarcely realized, all these conditions have been radically changed.

The civil war came and transferred hundreds of thousands of our citizens from the fields of labor to the field of arms, increasing temporarily the productive requirements while decreasing the productive energies of the country. Prices and wages were thereby stimulated and hundred of thousands

of European laborers, induced by these conditions, left their native lands and came here to fill the vacuum in our labor field. The wages paid by the country to its common soldiery, $16 a month, with rations and clothing, besides the bounties paid by municipalities, States, and the General Government, aggregating from $200 to $1,200, for an indefinite period of service, brought other hundreds of thousands of laborers from Europe to enter our armies; but the war closed in 1865, and although the productive requirements of the country were thereby greatly diminished, the millions of men who had been engaged in war were suddenly thrown back into the field of industrial competition. Nor did the tide of European labor immigration, begun and stimulated by the war, cease or diminish with the close of the war. New causes and inducements for its continuance were found or offered.

During this period several corporations were chartered for the purpose of constructing our great transcontinental lines of railway. To aid in such construction the Government granted to these corporations vast tracts of the undeveloped and unoccupied public domain. The corporations to which such grants were made, desiring to realize as soon as possible thereon, sent into every part of continental Europe their agents equipped with the most lurid descriptions of these lands and their productiveness and offered the most alluring terms to those who could be induced to become purchasers or settlers thereon. The agents of States and Territories having unoccupied lands followed throughout Europe in the wake of the agents of the railroads, offering like inducements to immigrants.

Thus again were tens and hundreds of thousands of immigrants induced to cross the ocean, many of whom stopped in the industrial centers of the country, and many more, after reaching their promised land, finding that too able literary talent had been employed in writing the prospectuses, returned to the marts of labor and became competitors in the overcrowded fields of toil.

Again, a revenue system constructed in time of war to meet the exigencies of war has been continued, and the great burdens imposed upon imports of foreign manufacture or production is maintained to encourage domestic production. The arguments urged in the maintenance of this system are, that by shutting out or impeding the importation of foreign commodities the domestic producer of such commodities is enabled to dispose of his products at greater profit, which profit he shares with his employees by the payment of higher wages; that therefore the main purpose in the maintenance of this policy is to protect American laborers by securing to them higher wages. That this is the policy of the Government, and that such results are obtained, has been everywhere and upon every occasion advertised to the world, and has resulted in greatly adding to our labor population by immigration from foreign countries. Not only has this been the result of such policy, but the beneficiaries of the system, instead of dividing their profits with their workmen as increased wages, have imported large numbers of foreign workmen under what was known as the contract labor system; which system now being prohibited by law, they are now employing large numbers of foreign immigrants under what is known as the "sweating system" to per-

form the work that American laborers have been compelled to abandon, or from which they have been locked out because they would not submit to reduction of wages, or would not or could not compete with such foreign laborers.

The real result of the system has been that American labor has been practically expelled from the protected industries, and the spectacle has often been presented of the strong arm of the military power of the State being raised to keep away American laborers from American labor. Side by side and hand in hand with the facts and conditions already recited, during this period there has developed a still more potent agency to cause congestion in the market for labor.

The past thirty years have witnessed a greater development of inventive genius and mechanical science in the production of labor-saving machinery than many centuries in any other period of the world's history. Measures have already been suggested and recommended by this committee looking to the ascertainment and publication of information and data showing the relative productive power of machinery and muscular force as now employed in the production of domestic manufactures, and calling for estimates as to the capacity of machinery in man power used in such production, and showing the increase or decrease in the creative cost of products due either to a lack or surplus of labor, or to the introduction of machinery in its manufacture. Such information, when obtained, we believe will be useful in the solution of many industrial problems, as well as the one now under consideration.

The contention is not made here that the volume

of labor has not also increased, or that a considerable percentage of the increase of the industrial energy of the country has not been absorbed in new and increased industries, and by the development and expansion of agricultural, commercial, and mineral resources.

In the period stated there has been a wonderful growth, development, and expansion of all these labor-absorbing agencies, but the contention is that the increase of muscular and mechanical force has been so much greater than the increased demand therefor that it has already produced acute congestion in the markets for labor; that there is not sufficient remunerative labor in the country for all who are willing to labor; that there is much enforced idleness, and that existing conditions are producing and must produce among the laboring classes of the country a spirit of dangerous discontent.

To demonstrate the propositions here stated we need only to reflect that scarcely five years since States, Territories, railroad corporations, and industrial concerns had agents and solicitors abroad in every European labor center, inviting and soliciting immigration of foreign laborers, while to-day the most difficult problem with which the people and the Government have to contend is how to prevent or check what has become an undesirable immigration and an unwanted increase of the labor population.

It is believed that if the principle embraced in the measure herewith presented was made of universal application it would be productive of much good in relieving, at least to a considerable degree, from the results of the conditions stated.

It may well be contended that if in any given community there be but sufficient labor to furnish remunerative employment for 1,000 men working a given number of hours each day, that if in such community there be 1,500 men with families dependent upon them for support, if 1,000 of these be permitted to absorb the whole of such labor and the remuneration therefor, the remaining 500 must remain in enforced idleness, and they and their families must perish or be supported by the 1,000 either as paupers or criminals. If this proposition be true, then as you enlarge the community until it embraces the whole country, maintaining the same relative relation of laborers to employment, you but augment the evils of the conditions by an enlargement of the area wherein such conditions exist. Men will live and must be supported while they live, whether they labor or remain idle, and the burden of the support of those who are idle, while voluntary or involuntary, must be borne by those who labor. True, the almshouse and prison are maintained by taxation levied upon the wealth of the country owned by the employing class; but this burden, borne by them in the first instance, enters as an element into the fixing of the wages of their employees and is thus thrown back upon those who labor.

The basis of agitation in movements looking to shortening the daily hours of service of those engaged in fatiguing physical labor are, first, to give needed opportunity for physical recuperation; second, to afford such laborer opportunity for the enjoyment of the society of his family and for social and intellectual improvement; third, in an overcrowded or congested labor market by expand-

ing the opportunities for obtaining employment, giving a more general and more equitable diffusion to the wage product of the labor of such market. The latter of these, by reason of the always overcrowded conditions of European population, has there been the commanding proposition in such movements, while in this country until recently the two former have been most urged, because of the fact that until recently the conditions upon which the latter is based have not existed in this country. That such conditions now exist your committee firmly believe, and that the universal application of the principle of the measure here presented would in its effects afford relief from such conditions and redound to the general good we entertain no doubt. That there is a widespread sentiment and popular demand for the passage of the proposed measure the records and files of this House amply attest.

While this report is being penned hundreds of thousands of American workmen in the great centers of industry are making public demonstration in favor of its principle, and as evidence of a demand for its enactment writers of eminence favor its adoption and attest their belief in its wisdom and in the necessity for its practical enforcement. Officers of the Government (as will be shown later) declare that its enforcement is practical and that such enforcement would not be prejudicial to the proper conduct of the Government's works. One eminent officer of the Government in the investigation of this subject authorized by the House by this committee under oath testified:

"The practicability of it (the measure here reported) is beyond question. As to the benefits

to labor, if you do it, it is beyond question, it would be the best thing that could be done. If you consider that it would have an influence to make labor eight hours everywhere, it would be a very great benefit."

The same eminent officer (Commodore Folger) declares his judgment that under an eight-hour system the labor product would be better than under the present system. Upon the same investigation he testified as follows:

"So far as the work rendered to the Government is concerned, my opinion is that the labor product to the Government, where the grade is high or of a superior class, would be vastly superior to the labor product at present. I am quite certain that the product that we have obtained at the Washington Navy-Yard is greater. We have cheapened the price of guns, working eight hours beyond that at which they can do it in private employ. I am ready to claim that the Government can make cheaper guns than the contractor can outside with ten hours."

The authorities of some few States and municipalities have enacted eight-hour laws, and to give the weight of the influence and example of the General Government to the legislative authorities of States and municipalities to make the application of such law universal, Congress adopted the principle in 1868 by an act approved June 25, 1868. It was enacted as follows:

"*Be it enacted, etc.*, That eight hours shall constitute a day's work for all laborers, workmen, or mechanics now employed or who may be hereafter employed by or on behalf of the Government of the United States, and that all acts and parts of acts inconsistent with this act be, and the same are hereby, repealed."

From the moment of the enactment of this law to the present there has been constant complaint that it was almost universally disregarded and evaded by the officers of the Government whose duty it was to observe and enforce it, and every succeeding Congress has been appealed to to so amend its provisions as to command and secure its observance.

There can be no question but that it was the intent of Congress, by the act of June 25, 1868, to limit the daily hours of service of the laborers and mechanics in the employ of the Government to eight hours in any one calendar day. If it is the present policy of the Government to adhere to and maintain that principle, then Congress should enact a measure that will command observance. If it is not the present policy of the Government to adhere to such principle, then Congress should immediately repeal the act of June, 1868. Its enactment, if it was not intended to be enforceable or be enforced, was but a mockery of the millions of citizens who desired an eight-hour law.

If it was intended to be enforceable and to be enforced its evasion by the officers of the Government and the failure of Congress to prevent such evasion by proper amendments are alike mockeries of the people. That the act was defective to enforce observance of its plain intent if the officers of the Government desired to evade it was determinable from its face, without any judicial interpretation. That it was thus defective was long since judicially determined. The Supreme Court in *United States* v. *Martin* (94 Otto, 400), in construing the act, says:

"The act of Congress of June 25, 1868 (15 Stat., 77), declaring that eight hours shall constitute a day's work for all laborers, workmen, and mechanics employed by or on behalf of the Government of the United States, is in the nature of a direction by the Government to its agents. It is not a contract between the Government and its laborers that eight hours shall constitute a day's work. It neither prevents the Government from making agreements with them by which their labor may be more or less than eight hours a day, nor does it prescribe the amount of compensation for that or any other number of hours of labor."

The testimony taken before this committee upon the investigation already referred to shows that the Department and bureau officials, acting upon such interpretation of the act—that is, that they were not prohibited from contracting with employees for the labor of such employees for more than eight hours in the day—made such agreements with most employees employed directly by the Government for service for a greater number of hours. It is also shown that much the greater part of the Government's work (upward of 75 per cent) is done under the contract system, and the officers of the Government held that they had no authority in the matter of regulating the hours of labor of the laborers and mechanics in the employ of contractors on Government work; that as to work done under contract the law did not apply; hence, by these two methods of evasion, the law has been practically annulled.

The measure herewith submitted, it is thought, will secure a practical enforcement of the purpose intended to be secured by the act of 1868. It limits the service and employment of all laborers

and mechanics employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor of the United States or of the District of Columbia, upon any of the public works of the United States or of the District of Columbia, to eight hours in any one calendar day; makes it unlawful for any officer of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics, to require or permit such laborer or mechanic to work more than eight hours in any one calendar day, except in cases of extraordinary emergency; makes the willful violation of its provisions a misdemeanor, and imposes suitable penalties for such violation. This measure differs essentially in three particulars from the act of June 25, 1868: First, it extends in plain terms to laborers and mechanics in the employ of contractors and subcontractors on Government works.

It might be contended that such laborers and mechanics were included in the act of 1868 under the words "by or on behalf of the Government," etc. However that may be, it was thought best not to leave the terms or meaning of this measure ambiguous. It will be urged that the measure ought not to extend to laborers or mechanics in the employ of contractors and subcontractors with the Government, but should be limited to direct employments by the Government. When it is considered that the purpose of Federal legislation on this subject is to lend the influence and example of this Government to the authorities of States and municipalities, having a broader scope of

jurisdiction in which to make the principle applicable, and when it is further considered that all the work of the Government in the construction of public buildings and 75 per cent of all other work of the Government, including river and harbor work, is now done by contract, and that if it was the desire of officials to evade the law every work, no matter how small, might be let by contract the law would be a dead letter when enacted. If we wish by the example of this Government to make the application of the principle universal, we must ourselves extend it to the limit of the scope of our jurisdiction.

Second. It makes it unlawful to allow or permit a laborer or mechanic to work more than eight hours in any one calendar day, thus prohibiting evasion in the manner the act of 1868 was evaded, which the Supreme Court held might be done by special contract with each employee to work a greater number of hours than eight. If this be permitted, then the law is a dead letter when enacted, for these contracts can and will be made with every employee. It will be contended by those who oppose any and all legislation upon this subject that the Government has no authority to prohibit the citizen from making what contract he may please concerning his personal service; that such provision is an unwarranted infringement of the natural rights of the citizen. Whatever might be the force of such argument, if the law was intended to affect contracts for service between individual citizens and relating to private work, we do not think the position is at all tenable when urged against this measure.

The citizen has no natural right to demand any

work from the Government, and if he obtains such work he must obtain it upon such terms as the Government sees fit to impose. As to its own work the Government has a lawful right to say that laborers thereon shall be employed for only one hour in the day, as it may lawfully provide that such laborer shall work any given number of hours. It can not compel the citizen to enter its employ, but it may prescribe the terms upon which he shall enter, if at all. Nor in any view is such provision an unwarranted interference with the natural rights of the citizen. If the objection were tenable, then the whole fabric of legislation looking to the regulation of the hours of labor would fall to the ground.

Governments exist upon the surrender or curtailment of the natural rights, the natural liberties, of man. One citizen may desire to labor each of the seven days in the week; another may desire to employ his services for all of those days. It is the natural right of the one to thus work and of the other to employ; but the law steps in and prohibits such employment on one of these days and limits the right of the citizen to work to six days in the week, and this is justified on the ground that it is for the public good. If the Government may limit the days a man shall work during a week, where is the restriction on its right to limit the hours he shall work during a day, if such limitation be justified by the public good to result therefrom?

Third. It differs from the act of 1868 in this, that it imposes proper penalties for a willful violation, and thus provides measures to secure its enforcement.

Your committee therefore recommend that the said bills of the House (H. R. 257, H. R. 276, and H. R. 442) be laid upon the table and that the accompanying substitute therefor do pass.

(3)

The following letter, in response to an inquiry of the Attorney-General dated December 12, 1906, indicates the attitude of the War Department upon some of the questions discussed in the brief:

[Second indorsement.]

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, December 28, 1906.

1. Respectfully returned to the Secretary of War.

2. The dredging of rivers and harbors has always been regarded as a "public work" within the meaning of the acts of August 13, 1894, and February 24, 1905, and of paragraph 570, Army Regulations, and in each instance a bond is exacted, which provides that if the contractor "shall promptly make full payments to all persons supplying it (him or them) labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to retain in full force and virtue."

3. In requiring such a bond it has never been the purpose or intention of this office to attempt to discriminate as to which of the employees of dredging contractors were laborers or mechanics within the meaning of the eight-hour law, as prior to July 14, 1906, it had been held that officers who enter

into contracts on behalf of the United States are not charged with the duty of enforcing the law with reference to those with whom they contract, the latter being directly responsible in the matter. With regard to the crews of Government dredges, however, they were in general thought to be within the excepted class covered by the decision of Attorney-General Miller, dated August 27, 1892 (20 Opin. Atty. Gen., 459), upon which it is understood, paragraph 734, Army Regulations, is based.

4. When instructions were issued by the Secretary of War, on July 14, 1906, to the effect "that it is the duty of the officers of the War Department, in respect to Government contracts which are performed under their supervision and for the performance of which they are responsible, to use the powers they have to prevent violations of the law, and especially the Federal law, by contractors for the work which comes under their supervision," and calling for reports of all cases where laborers and mechanics employed by any contractor or subcontractor upon any public works of the United States had within the past two years been required to work more than eight hours a day, it was deemed advisable, since the correctness of the above-mentioned view of this office as to dredge employees was questioned, to regard dredging contracts as among the doubtful cases and to include all such in the reports of violations of the law, leaving it to the courts to decide the applicability of the law to them.

5. Since it would hardly be consistent for the Government to proceed against contractors for alleged violations of the eight-hour law without

applying the same interpretation of law to itself, attempts have since been made, pending decision by the courts upon some of the evidence presented, to reclassify the employees on floating plant of the engineer department with reference to said law. The authority for such action may be found in the opinion of the Attorney-General, dated May 22, 1905 (25 Opin. Atty. Gen., 465). In view of the somewhat meager legal decisions upon this point, this has been a difficult task. The only court decision known to this office which defines the status, under the law, of employees on floating plant is that rendered in case of *United States* v. *Jefferson* (60 Fed. Rep., 736). The court in its opinion emphasizes the dual nature of the services of crews of vessels while removing obstructions from navigable waters and imposes the duty of differentiating between their duties as seamen and as laborers. It has therefore been held that the labor of such employees as deck hands, foremen, machinists, blacksmiths, and ordinary laborers on board the dredges actually engaged on the public works of the United States, such as dredging operations, etc., and work incident thereto, should be restricted to eight hours per calendar day, except in extraordinary emergency, while to masters, pilots, mates, steam engineers, enginemen, stokers, stewards, cooks, cooks' helpers, waiters, and the like, whose work is not continuous, and who may be called upon at any or occasionally at all hours of the day to perform work to dredges while en route, and to the crews of tugs, steamers, survey and inspection boats, etc., who are strictly seamen, the law does not apply. It also seems reasonable to assume that in reckoning the eight-hour day for laborers

and mechanics not living on board dredges they should not, as a rule, be held to work or available for work for more than eight hours per day, but for those who live and are subsisted aboard the dredges only time in which they actually perform work should be considered.

6. The question of determining the status of the crews of self-propelling dredges is still more perplexing. These dredges are in reality seagoing vessels, having heavy suction pumps and bins for retaining dredged material, and when in operation they are slowly moving up and down the navigable channel, sucking into their bins the mud and later dumping it at the place of deposit. The question as to whether any of the employees of these self-propelling dredges can be regarded as other than seamen is in doubt.

7. The embarrassment which exists in the engineer department over the proper classification of employees on floating plant, under the eight-hour law, is clearly shown by the accompanying copy of letter of Maj. J. C. Sanford, Corps of Engineers, in charge of the Philadelphia district. It is hoped that much light will be shed upon the situation by one or more court decisions upon the cases of assumed violations of the law by dredging contractors which have been reported from time to time by this office, and to this end the recommendation contained in the communication of the Chief of Engineers to the Secretary of War, September 17, 1906 (E. D., 60017), is hereby renewed.

8. Copies of the forms of bond in use in the Engineer Department are inclosed herewith.

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

[Third indorsement.]

WAR DEPARTMENT,
January 2, 1907.

Respectfully returned to the honorable the Attorney-General, inviting attention to the foregoing report of the Chief of Engineers, U. S. Army, and to the accompanying inclosures referred to.

ROBERT SHAW OLIVER,
Assistant Secretary of War.

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(4)

RÉSUMÉ OF ORDERS, CIRCULARS, MEMORANDA, ETC., WITH REFERENCE TO THE EIGHT-HOUR LAW, ISSUED BY THE WAR DEPARTMENT.

August 1, 1892, General Orders, No. 7, for the information of the officers of the Corps of Engineers and agents employed under the Engineer Department, directed that the first two sections of the act should be incorporated into the terms of all proposals issued for public works and all contracts thereafter made.

October 15, 1892, by General Orders, No. 9, the prior order was revoked in view of the Department's interpretation of Attorney-General Miller's opinion (ante, p. 41).

Army Regulation 728, in the edition of 1895, and 734, in the edition of 1905, provides:

"Eight hours constitute a day's work for all mechanics and laborers employed by or on behalf of the United States, except in cases of emergency. This rule does not extend to engineers, firemen, seamen, watchmen, messengers, teamsters, and others the nature of whose employment is peculiar and whose services may be necessary at any or occasionally at all hours of the day."

A.

CIRCULAR, No. 33.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, July 30, 1906.

It has been decided by the Secretary of War "that it is the duty of the officers of the War Department, in respect to Government contracts which are performed under their supervision and for the performance of which they are responsible, to use the powers they have to prevent violations of the law, and especially the Federal law, by contractors for the work which comes under their supervision."

To permit compliance in accordance with instructions received in connection with the above decision, district officers will submit to this office at the earliest date practicable all cases in which, to the knowledge of such officer or his assistants, laborers and mechanics employed by any contractor or subcontractor upon any public works of the United States have, within the past two years, been required to work more than eight hours a day, and in any such cases under what emergency, if any, this work was performed. In making this report officers will furnish such available details as will permit a proper consideration of the case by the Department of Justice. *Attention is called to the fact that the emergency provision in the law is considered to cover any extraordinary emergencies which can not be foreseen, such as might be necessary for saving life or property of the United States, and not cases which depend for their emergency solely upon economical methods of work or importance of rapid construction.*

There will arise numerous cases in which doubt will be felt whether the work of a contractor or subcontractor has been or will be a work which is properly to be classed as coming under the restrictions as to work "of laborers and mechanics" upon any of the "public works" of the United States; but in all cases of doubt the facts will be as fully presented as information warrants, with a view to a decision being given by higher authority.

If the preparation of a full report upon this subject would result in material delay, officers will submit the cases from time to time as the facts are collected.

By command of Brig. Gen. Mackenzie:

FREDERIC V. ARBOT,
Major, Corps of Engineers.

B.

CIRCULAR, No. 38.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, August 11, 1906.

The Secretary of War directs that in all specifications hereafter the especial attention of the contractors must be called to the eight-hour act in order that they may be advised that, should they fail to comply, they will be reported by the officers of the War Department for such action as the Department of Justice may deem it proper to take.

To provide for compliance with such requirement, the following paragraph will be introduced in the specifications of all contracts for public

works carried on under the supervision of this Department involving the employment on such works of laborers and mechanics:

"The attention of bidders is called to the following act of Congress:"

(Here follows the act of 1892.)

"All bidders are advised that, should the contractors for the work fail to comply with this law, they will be reported by the officers of the War Department for such action as the Department of Justice may deem it proper to take."

In connection with the preceding, the following opinion of the Acting Attorney-General is published for the information and guidance of all concerned:

(Here follows an opinion (26 Opin., 36) not necessary to be included.)

By command of Brig. Gen. Mackenzie:

FREDERIC V. ABBOT,
Major, Corps of Engineers.

C.

CIRCULAR, No. 62.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, December 26, 1906.

The following extracts from correspondence touching upon the enforcement of the eight-hour law, more particularly as relates to the interpretation of the "extraordinary emergency" clause, is published for the information and guidance of the Corps of Engineers:

POINTE AU PIC,
PROVINCE OF QUEBEC, CANADA,
July 29, 1906.

Hon. ROBERT SHAW OLIVER,
Asst. Secy. of War, Washington, D. C.

MY DEAR GENERAL: I have your letter of July 24, 1906, referring to my instructions concerning certain alleged infractions of the eight-hour law and inclosing a memorandum from the Quartermaster-General regarding the violation of the law at * * *.

The action of * * *, constructing quartermaster at * * *, was in direct violation of law, for the reason that no case of extraordinary emergency is shown. An "extraordinary emergency" under the act is one not to be foreseen in time to avoid the necessity of exceeding the limit of the fixed daily hours of labor by the employment of more men or more shifts of men. Mere economical considerations do not affect the question at all. It is to be assumed that in making the requirement Congress knew that under many conditions the law would impose great expense upon the Government. What action shall be taken with respect to * * * violation of law I shall delay deciding until I see you and confer with the President.

The question whether inspectors of Government contract work done in a private factory like a shoe factory are within the law is one I should wish submitted to the Judge-Advocate-General and ultimately to the Attorney-General. My first impression would be that such inspectors were neither "laborers" nor "mechanics" within the law.

I am very clear also that the law only applies to laborers and mechanics directly engaged by the Government and to laborers and mechanics of contractors and subcontractors on contracts for the construction of works on public lands or easements, and not to contracts for construction of

articles to be furnished to the Government by delivery after completion. The latter are not public works within the statute.

The rulings of the Department will be in accord with the foregoing until further order. You can send a copy of this to the Commissioner of Labor as an informal memorandum. Meantime please ascertain all the details concerning the contract of employment of the inspectors and their duties and submit the matter, as above suggested, to the Judge-Advocate-General and the Attorney-General.

Very sincerely, yours,

WM. H. TAFT.

I return the * * * papers.

DEPARTMENT OF JUSTICE,
Washington, October 31, 1906.

To United States attorneys:

By order of the President, your attention is directed to the provisions of "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," approved August 1, 1892 (27 Stat., 340), commonly known as the eight-hour law.

The Government is determined upon a strict enforcement of this statute, and you are directed diligently to investigate all complaints which may come to you from any source of violations of this law, and upon your own initiative to make investigation if there appears to you to be any reasonable ground for suspecting violation of this law. In every case in which you can secure sufficient evidence you will submit that evidence to the grand jury, with a view to securing an indictment.

Your attention is particularly directed to the exception in the first section of the statute, under which laborers and mechanics may be worked

more than eight hours in a calendar day "in case of extraordinary emergency." In a recent case in the district of Massachusetts Judge Dodge defined that phrase as follows: "An extraordinary emergency, such as is contemplated by the act, is the sudden, unexpected happening of something not of the usual, customary, or regular kind, demanding prompt action to avert imminent danger to life, limb, health, or property. The possibility of danger is not enough. The peril must be certain, unusual, imminent, and actual in order to constitute an extraordinary emergency such as the statute contemplates." Judge Dodge also ruled that probable pecuniary loss to the contractor, unless due to an extraordinary emergency, as defined above, is only an ordinary business risk.

I desire to impress upon you the importance of using every effort to execute these directions; of being vigilant and active in this matter. You will make prompt and full report to me of all cases and of your action thereon, with your reasons therefor. You will report immediately the action of the grand jury and the results of all trials, with a specific statement of the penalty imposed.

Respectfully,

WILLIAM H. MOODY,
Attorney-General.

[60017—C. of E.]

By command of Brig. Gen. Mackenzie:

FREDERIC V. ABBOT,
Lieut. Col., Corps of Engineers.

D.

WAR DEPARTMENT, *Washington.*

Memorandum for the Chief of Engineers.

I have received a call from the Commissioner of Labor and the heads of certain dredge workers'

unions in reference to the application of the eight-hour law to the dredging done directly by the Government and under the control and supervision of the engineering bureau of this Department. I am also informed that the Attorney-General has in effect taken the position, and that the attitude of the Government in court is, that the men engaged in dredging on the steam dredges are within the operation of the law and should not work for more than one shift of eight hours a day. I am also advised that this question is pending in the Supreme Court on appeal from the decision of a Massachusetts Federal court. Commissioner Neill thinks that it is an inconsistent position for the Government to occupy to have men, working under its control and direction, work under a theory of the law at variance with that which it has taken before the courts and which has been sustained by certain of the lower courts already. In this view I concur, and you are therefore directed to order all your subordinate officers having in charge men working upon dredges to work them but eight hours a day until the decision of the Supreme Court shall otherwise decide, if it does so decide. This, with such exceptions as you may establish to my satisfaction, are absolutely necessary to preserve the Government property as it is.

WM. H. TAFT,
Secretary of War.

MARCH 7, 1907.

E.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, March 15, 1907.

Memorandum for the Secretary of War.

1. Referring to the memorandum for the Chief of Engineers, dated March 7, 1907, giving instructions concerning the enforcement of the eight-hour law on Government dredges, attention is invited to the following considerations:

2. The memorandum is based upon the assumption that the attitude of the Government in court in the matter of contractors' dredges is that all the employees on such dredges are subject to the provisions of the eight-hour law, while the Government itself in its operation of dredges assumes a contrary policy, and that orders are necessary to correct such apparent inconsistency. It is presented, however, that, as understood by the Chief of Engineers, the Department of Justice has not taken the stand that all employees on contractors' dredges are subject to the eight-hour law, and, again, that all instructions heretofore given with respect to the dipper and clam-shell dredges of the Government, which dredges are similar to those in use by contractors, are to the effect that they should be operated under provisions of the eight-hour law, so far as the working of the dredges is concerned, excepting that a very few of the employees, such as master of dredge and probably cooks, firemen, and watchmen, may by the nature of their employment exceed the limits of an eight-hour day and the dredges can not be operated for eight

hours without such results; and the only question now presented is as to the applicability of the eight-hour law to the few exceptional employees above referred to.

3. The Government operates, however, a large number of another class of dredges, which are in fact ocean steamships, the employees of which are ordinarily of same class as are the employees on Government transports or other ships. No contractors own or operate any dredges of this class, and any consideration by the courts of the case of the ordinary contractor's dredge will probably have little bearing on the other class of employees. On such hydraulic dredges, however, all employees whose work is at all continuous are limited in their work to eight hours. Other employees, however, who are in effect sailors, may, as in the case of other Government ships, be on duty when not actively engaged in work in excess of eight hours. Such employees are, however, of the class which the opinion of the Attorney-General and the decision of the court have proven as exceptions to the eight-hour law. Many of such boats are kept at work the twenty-four hours of the day, and a change in the present system can only be effected, in most cases, by reducing the working time of the boats, it being impracticable to furnish accommodations for larger crews.

4. The act of August 1, 1892 (27 Stats. L., 340), commonly known as the eight-hour law, specifically applies to "laborers and mechanics" only, and from the date of its passage until the present time there have been a number of decisions by the legal officers of the Government and at least one court decision as to who constitute "laborers and me-

chanics" within the meaning of the law, thus clearly emphasizing the fact that the law is not universal in its application to all employees, but applies only to the classes specifically named.

5. One of the earliest opinions on this point is that of Attorney-General Miller, dated August 27, 1892, in which he says:

"Second. As to your second question, pertaining to particular employees, I beg to suggest that its answer depends upon matters of fact not stated and not within my cognizance. If the employees named are ordinary laborers or mechanics, working for the Government for wages under ordinary conditions, the statute would seem to apply. At the same time it is quite apparent that, as to some of them, it might frequently happen that they would be within the emergency exception named in the statute; and as to others, as, for instance, sailors or others on shipboard, or teamsters, their employment being peculiar, they might well be held to be, as a matter of fact, neither laborers nor mechanics within the meaning of this law."

And one of the latest is that of Attorney-General Moody, dated May 22, 1905, in which he uses the following language, particularly covering the point in question:

"On the other hand, the statute applies only to those persons who may *fairly come within the description of laborers and mechanics.* * * *

"It is believed that, giving to the words the meaning which is ordinarily accepted for them, and *having in mind that the act should not be extended beyond its plain terms*, the Commission will have no difficulty in determining in each case as it arises whether the employee is a laborer or mechanic or whether his duties are such as to warrant some other designation of his employment."

6. This distinction is also plainly recognized in paragraph 734, Army Regulations.

7. When the instructions of the Secretary of War of July 14, 1906, to report all cases in which contractors violated the law, were received it was recognized that there would be a number of doubtful cases, such as certain classes of dredge employees, and in order to be on the safe side orders were issued to district officers to report all cases in which such employees worked over eight hours, with a view to submitting such reports to the Department of Justice, in order that test suits might be brought in the courts and an authoritative decision rendered which would definitely and clearly fix the status of dredge employees in their relation to the eight-hour law.

8. It is understood that the only suit which has been formally instituted by that Department and decided is the Boston case, in which an employee of the contractor styled a "deck hand" was selected as a type of "laborer" and a steam engineer as a type of "mechanic," with a further statement of the nature of the duties of the other employees. The suit was a friendly one; no defense was made by the contractor, and it is understood that the primary object of the Department of Justice in instituting it was to get an authoritative decision in the matter and not for the purpose of securing punishment of the contractors for violation of the law, and that therefore such action can not properly be construed as committing the Department of Justice or the Government in general to the proposition that all employees on dredges are laborers or mechanics within the meaning of the law.

9. It is undoubtedly true that the question as to who among the men on dredges are laborers and mechanics and who are not is a difficult one to determine. But it is equally certain, in the opinion of this office, that not all of these men can be held to be laborers or mechanics within the meaning of the law. This opinion is sustained by the decision of the court in the case of the *United States* v. *Jefferson* (Fed. Rep., vol. 60, p. 736), in which the dual nature of the services of crews of vessels while removing obstructions from navigable waters was emphasized, and the duty imposed of differentiating between their duties as seamen and laborers, and also by the opinions of the Attorneys-General above referred to. Particulary is this true of the crews of self-propelling seagoing dredges, which are large seagoing vessels having heavy suction pumps and bins for retaining dredged material, and which when in operation are slowly moving up and down the navigable channel, pumping into their bins mud and sand and later dumping it at the place of deposit. The question as to whether any of the employees of these self-propelling dredges can be regarded as other than seamen is very doubtful.

10. The difficulty as to the proper classification of employees on dredging plant as regards the eight-hour law is clearly shown by the accompanying letter from Maj. J. C. Sanford, Corps of Engineers, in charge of the Philadelphia district.

11. Since the receipt of the order of July 14, 1906, above referred to, greater care has been exercised by this Department in the classification of its own employees on dredges, as will appear from the following extracts from the confidential circu-

lar issued by this office to district officers on September 24, 1906:

"While the recent instructions received and the resulting circulars and instructions relate especially to contract work, the matter of day's labor work should have the most careful consideration by officers in local charge of engineering districts, with a view of determining whether, as is assumed, the eight-hour law is being fully observed in connection with employees on such works. It must be remembered that the duty of officers to execute their work rapidly and economically is not in itself any justification for the slightest nonobservance of the law and would prove no defense in the eyes of superior authority or of the courts. Great care should be taken in exercising discretion as to what workmen are excepted from the classes of 'laborers and mechanics on public works' under opinion of the Attorney-General and paragraph 734, Army Regulations. From some reports received it appears possible that too liberal an interpretation is being given to the Attorney-General's opinion and that under the guise of such liberal interpretation the eight-hour law is being violated. * * *

"It is appreciated that all engineer officers and agents are actuated by a desire to carry on work assigned to them in an economical businesslike way and to secure at the earliest time practicable results commensurate with the money expended, and there will naturally be feelings of regret if any law apparently interferes with successful operations; but where there may be such apparent conflict between successful and economical operations and any law it must be remembered that while a businesslike execution of work is most desirable when practicable complete observance of law and regulations, both as to work and intent, is imperative."

12. It is the earnest desire of the Chief of Engineers and his subordinates to comply with the

eight-hour law, but there is also imposed upon them by Congress, in the expenditure of the large sums of money appropriated for river and harbor improvements, a considerable portion of which is devoted to dredging, the duty of securing the best results possible from the expenditures of these funds. Bearing in mind, then, these two points and what is understood to be the real attitude of the Department of Justice in the prosecution of the dredging cases referred to, the Chief of Engineers can not feel that there is any real inconsistency in the employment of, for more than eight hours per day, such of the employees on United States dredges as it is believed do not come within the provisions of the law. On the other hand, this appears to be his plain duty, taking into consideration the opinions of the legal officers of the Government on the classification of such employees, so far as known, and pending a definite decision by the United States Supreme Court.

Very respectfully,

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

F.

CIRCULAR, No. 12.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, March 18, 1907.

1. The following memorandum of the Secretary of War, dated March 16, 1907, and addressed to the Chief of Engineers, is published for the information and guidance of the Corps of Engineers:

My memorandum of date March 7, 1907, to you is changed to read as follows:

I have received a call from the Commissioner of Labor and the heads of certain dredge-workers' unions in reference to the application of the eight-hour law to the dredging done directly by the Government and under the control and supervision of the engineering bureau of this Department. I am also informed that the Attorney-General has in effect taken the position and that the attitude of the Government in court is that the men engaged in dredging on the steam dredges are within the operations of the law and should not work for more than one shift of eight hours a day. I am also advised that this question is pending in the Supreme Court on appeal from the decision of a Massachusetts Federal court. Commissioner Neill thinks that it is an inconsistent position for the Government to occupy to have men, working under its control and direction, work under a theory of the law at variance with that which it has taken before the courts and which has been sustained by certain of the lower courts already. In this view I concur, and you are therefore directed to order all your subordinate officers having in charge men working upon dredges to work all employees whose duties are in effect those of mechanics and laborers but eight hours a day until the decision of the Supreme Court shall otherwise decide, if it does so decide; this with such exceptions as you may establish to my satisfaction are absolutely necessary to preserve the Government property as it is.

WM. H. TAFT,
Secretary of War.

2. The above instructions should be strictly followed.

3. It is understood that a large number of the employees on dredges other than those of the self-propelling suction type, especially where the crews

do not live aboard, and some of the employees on the self-propelling dredges, particularly those whose labors are continuous, come within the provisions of the law and of these instructions. Therefore they should not be required to perform more than eight hours of effective labor per day. The actual dredging operations of dredges of the former class should be limited to eight hours per day for a single crew and to sixteen hours per day for a double crew.

4. In all cases in which district officers are in doubt as to the application of the law and of the above instructions, they should submit a full statement of all the facts and circumstances to this office for decision.

[60017—C. of E.]

By command of Brig. Gen. Mackenzie:

FREDERIC V. ABBOT,
Lieut. Col., Corps of Engineers.

G.

WAR DEPARTMENT,
Washington, March 23, 1907.

Memorandum for the Chief of Engineers, in response to his memorandum of March 15, 1907.

It is recognized that there may be employees of the Government on board seagoing dredges and other dredges who do not come within the eight-hour law. For the purpose of determining this matter, the Chief of Engineers is directed to formulate questions to be answered by the Attorney-General which will enable us to comply with the

law as it should be construed. The instructions issued by the Chief of Engineers on September 24, 1906, are fully approved, and the difficulty in the enforcement of the law is well understood, but there must be some classification and some rule adopted by which this very troublesome question shall be settled for the Department, and if questions can be formulated the answer to which will assist in this definition, it will greatly facilitate matters.

WM. H. TAFT,
Secretary of War.

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